



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2011

Mr. James Downes
Assistant County Attorney
Harris County Hospital District
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2011-07056

Dear Mr. Downes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 419557 (CA File No. 11HSP0196).

The Harris County Hospital District (the "district") received a request for a copy of the requestor's employment file. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed performance evaluations that are subject to section 552.022(a)(1). Although you raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the

governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022 under section 552.103. However, as section 552.136 of the Government Code is "other law" for purposes of section 552.022, we will consider the applicability of this exception to the information that is subject to section 552.022, as well as the remaining responsive information. Additionally, we will consider your claim under section 552.103 for the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code provides, in part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

In this instance, you provide documentation showing that, prior to the date of the receipt of the present request for information, an employment discrimination lawsuit, styled *Thomas Konnethu v. Harris County Hospital District*, Case No. 4:10CV2941, was filed by the

requestor against the district, and is currently pending in the United States District Court for the Southern District of Texas. Based on your representations and our review, we agree litigation to which the district is a party was pending on the date the district received the present request. Furthermore, we find the information at issue is related to the pending litigation. Thus, section 552.103 of the Government Code is generally applicable to the information at issue.

We note, however, it appears the opposing party has seen or had access to most of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once the opposing party in the anticipated litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the district may withhold the portions of the submitted information that the opposing party to the litigation has not seen or had access to, which we have marked, under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your assertion that the marked district employee identification numbers ("EINs") are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 of the Government Code states, "Notwithstanding any other provision in this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *See* Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). You state the EINs may be used, in conjunction with passwords, to access patient personal and financial information, including billing information, in the district's electronic patient records. Based on your representations and our review, we agree that the district must withhold the EINs you have marked, as well as the EINs we have marked, under section 552.136 of the Government Code.

In summary, the district may withhold the information we have marked under section 552.103 of the Government Code. The district must withhold the EINs you have marked, as well as the EINs we have marked, under section 552.136 of the Government Code. The remaining information must be released.¹

¹We note a portion of the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023. Thus, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Kirsten Brew".

Kirsten Brew
Assistant Attorney General
Open Records Division

KB/dls

Ref: ID# 419557

Enc. Submitted documents

c: Requestor
(w/o enclosures)